Supreme Court of the United States

OCTOBER TERM, 1970

No. 60

LEANDER H. PEREZ, JR., LOUIS REICHART, GEORGE BETHEA, and EARL WENDLING,
Appellants,

versus

AUGUST M. LEDESMA, JR., HAROLD J. SPEISS, and LAWRENCE P. PITTMAN,
Appellees.

On Appeal from the United States District Court, Eastern District of Louisiana, New Orleans Division

ORIGINAL BRIEF ON BEHALF OF APPELLANTS

CHARLES H. LIVAUDAIS,
Attorney for Appellants,
2006 Packenham Drive,
Chalmette, Louisiana 70043.

Of Counsel:
ROBERT J. KLEES,
Attorney at Law,
Chalmette, Louisiana.

August 13, 1970

TABLE OF CONTENTS

TABLE OF AUTHORITIES

AUTHORITIES (Continued)

AUTHORITIES (Continued)

AUTHORITIES (Continued)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 60

LEANDER H. PEREZ, JR., LOUIS REICHART, GEORGE BETHEA, and EARL WENDLING,
Appellants,

versus

AUGUST M. LEDESMA, JR., HAROLD J. SPEISS, and LAWRENCE P. PITTMAN,
Appellees.

On Appeal from the United States District Court, Eastern District of Louisiana, New Orleans Division

---

ORIGINAL BRIEF ON BEHALF OF APPELLANTS

Appellants appeal herein from the Judgment of a Three Judge Federal Court in the United States District Court for the Eastern District of Louisiana, New Orleans Division, which held, in a 2 to 1 decision, that although the Louisiana Criminal Obscenity Statute is Constitutional, arrests and prosecutions thereunder for sale of, or possession with intent to sell, obscene materials and publications, are invalid for lack of a judicial adversary hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms of the State Statute. Appellants submit that a judicial adversary hearing is not required

prior to arrest and prosecution of a person under the State Statute.

THE OPINIONS BELOW

The Majority and Dissenting Opinion of the Three Judge Court of the United States District Court for the Eastern District of Louisiana, New Orleans Division, are reported at 304 F. Supp. 662, and appear in the Appendix at pp. 83 to 118.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This action was instituted by Appellees in the District Court for the Eastern District of Louisiana, New Orleans Division, under 42 U.S.C. 1983 and 28 U.S.C. 1331, 1343 and 2201, to enjoin the prosecution of Appellee August M. Ledesma, Jr. in the 25th Judicial District Court for the Parish of St. Bernard, State of Louisiana; to declare unconstitutional Louisiana Revised Statute 14:106 (Obscenity) and St. Bernard Parish Ordinance 21-60; and for additional injunctive relief, and damages for appellees in the sum of $30,000.00 each.

On July 14, 1969, two members of the Three Judge Court rendered an opinion holding that Louisiana Revised Statute 14:106 (Obscenity) is Constitutional, but that no arrest or prosecution thereunder can be made for crimes involving obscene materials or publications unless there has been a judicial adversary hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms

of the State Statute. The Court further refused to grant injunctions as to the pending prosecutions of Appellee Ledesma in the State Court, or as to future arrests and prosecutions under the State Statute, but nevertheless held that Appellants could not "in good faith" continue the pending prosecutions, or effect any future arrests or prosecutions under the State Statute. The Court also ordered the return of all seized materials, instanter, and the suppression of said materials in any pending or future prosecutions, and declared St. Bernard Parish Ordinance 21-60 to be unconstitutional.

The Dissenting Opinion of the Three Judge Court held that a Prior Judicial Adversary Hearing is not necessary in the enforcement of the State Statute, and that the Federal Court should not interfere with the State prosecutions.

Judgment was entered into the record on August 13, 1969. A Notice of Appeal to this Court was filed in the United States District Court, Eastern District of Louisiana, New Orleans Division on September 12, 1969.

Jurisdiction was postponed herein on June 29th, 1970, to the hearing of the case on the merits.

The Jurisdiction of this Court to review the decision of the Three Judge Court on direct appeal is conferred by 28 U.S.C. 1253.

STATUTES INVOLVED

Involved herein are Louisiana Revised Statutes, Title 14, Section 6 (printed verbatim at pp. 99 to 101 of the Appendix); St. Bernard Parish Ordinance No. 21-69 (printed verbatim at pp. 102 to 106 of the Appendix); and Section 2283 of Title 28 of the United States Code (printed verbatim at p. 19, infra).

QUESTION PRESENTED BY THE APPEAL.

In a State Criminal Prosecution under a valid and Constitutional State Statute relative to obscene materials and publications, is it necessary that there be a Judicial Adversary Hearing, prior to arrest and prosecution of the defendant, to determine whether or not the materials and publications are obscene under the terms of the State Statute?

QUESTIONS PRESENTED BY THE COURT

In addition to the question presented in the Jurisdictional Statement, this Court requested that the parties brief and argue the following:

I.

Was it an appropriate exercise of discretion for the Three Judge Court to grant the relief in paragraphs 1 and 2 of the judgment of August 14, 1969, in view of the pendency of the State prosecution charging violation of Louisiana Revised Statutes 14:106?

II.

Was it an appropriate exercise of discretion for the Three Judge Court in paragraph 4 of said judgment to declare the St. Bernard Parish Ordinance No. 21-69 unconstitutional?

STATEMENT OF THE FACTS OF THE CASE

On January 27, 1969, Appellants Reichart, Bethea and Wendling, law officers of the St. Bernard Parish Sheriff's Office, arrested Appellee Ledesma at the Broad-Bruxelles Seafood and News Center No. 3 at Arabi in St. Bernard Parish, Louisiana and booked him with violation of Louisiana Revised Statute Title 14:106, and St. Bernard Parish Police Jury Ordinance 21-60, relative to obscenity. Immediately prior to the arrest Appellant Wendling had purchased two publications from Appellee Ledesma, namely: One issue of Rapture Magazine ($2.00) and one issue of Naked Films Magazine ($2.50). Appellant Reichart, also immediately prior to the arrest, had purchased one issue of Nudist Adventure Magazine ($2.50), and one issue of National Climax newspaper. Incidental to the arrest Appellants took as evidence from Appellee's shelves thirty-five (35) publications and four (4) decks of playing cards, the originals of which have been transported to the Clerk of this Court with the Record transmitted from the District Court from which this appeal was taken.

Four Bills of Information were filed against Ledesma in the 25th Judicial District Court for the Parish of

St. Bernard, State of Louisiana, by Appellant Perez, District Attorney for the said 25th Judicial District, said Bills being based upon Ledesma's possession and exhibition of the aforementioned publications and playing cards. Subsequently, Appellant Perez entered a Nolle Prosequi in each of the Bills of Information relative to Violations of the St. Bernard Parish Police Jury Ordinance. The remaining two cases relative to Violations of the Louisiana State Statute are pending trial in the State Court. Appellees Ledesma, Speiss and Pittman, allegedly partners in the operation of the Broad-Bruxelles Seafood and News Center No. 3, were at no time prohibited from actively engaging in their business of selling publications, food and other items at their establishment and suffered no loss of business or income as a result of the police actions.

On February 17, 1969, Appellees filed a Complaint in the District Court for the Eastern District of Louisiana, New Orleans Division under 42 U.S.C. 1983 and 28 U.S.C. 1331, 1343 and 2201, seeking to enjoin the above prosecution of Appellee Ledesma in the State Court; to declare unconstitutional Louisiana Revised Statute 14:106 (Obscenity) and St. Bernard Parish Ordinance 21-60, and to enjoin any future arrests or prosecutions thereunder; and for additional injunctive relief, and damages for Appellees in the sum of $30,000.00 each. A Three Judge Court was appointed to hear the matter, and after a hearing on all matters except damages two members of the Three Judge Court rendered an opinion holding that Louisiana Revised Statute 14:106 (Obscenity) is Constitutional, but that no arrest or prosecution thereunder can be made for crimes in-

volving obscene materials or publications unless there has been a Judicial Adversary Hearing, prior to arrest, to determine whether or not the materials and publications are obscene under the terms of the State Statute. The Court further refused to grant Injunctions as to the pending prosecutions of Ledesma in the State Court, or as to future arrests and prosecutions under the State Statute, but nevertheless held that Appellants could not "in good faith" continue the pending prosecutions, or effect any future arrests or prosecutions under the State Statute. The Court also ordered the return of all seized materials, instanter, and the suppression of said materials in any pending or future prosecutions, and declared St. Bernard Parish Ordinance 21-60 to be unconstitutional. The Dissenting Opinion of the Three Judge Court held that a Prior Judicial Adversary Hearing is not necessary in the enforcement of the State Statute, and that the Federal Court should not interfere with the State prosecutions. It is from that portion of the Majority Opinion requiring a Prior Judicial Adversary Hearing in the enforcement of Louisiana Revised Statute 14:106 (Obscenity) that this appeal was taken.

ARGUMENT

I.

OBSCENITY IS NOT WITHIN THE AREA OF CONSTITUTIONALLY PROTECTED SPEECH OR PRESS, AND BOTH THE STATES AND FEDERAL GOVERNMENT MAY TAKE PROPER STEPS WITHIN CONSTITUTIONAL SAFEGUARDS TO PREVENT

THE DISSEMINATION OF OBSCENE MATERIALS INTO SOCIETY AND TO PUNISH THOSE GUILTY OF SO DOING

The above principle of law has been firmly entrenched in the jurisprudence of this Honorable Court.

Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L Ed. 2d 1498 (1957);

Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304, 1 L Ed. 2d 1498 (1957);

Kingsley Books v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L Ed. 2d 1469 (1957);

Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708, 6 L Ed. 2d 1127 (1961);

Bantam Books v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L Ed. 2d 584 (1963);

A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L Ed. 2d 809, (1964);

Mishkin v. New York, 383 U.S. 502, 86 Sup. Ct. 598, 16 L Ed. 2d 56, reh den 384 U.S. 934, 86 S. Ct. 1440, 16 L Ed. 2d 535, (1966);

Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L Ed 2d 31, reh den 384 U.S. 934, 86 S. Ct. 1440, 16 L Ed. 2d 536 (1966);

Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L Ed. 2d 195, reh den 391 U.S. 971, 88 S. Ct. 2029, 20 L Ed. 2d 887 (1968);

Holden v. Arnebergh, 394 U.S. 102, 89 S. Ct. 926, 22 L Ed. 2d 112 (1969);

New York Feed Company v. Leary, 397 U.S.

98, 90 S. Ct. 817, 25 L Ed. 2d 78 (Feb. 27, 1970);

Milky Way Productions v. Leary, 397 U.S. 98, 90 S. Ct. 817, 25 L Ed. 2d 78 (Feb. 27, 1970).

The two paramount issues in cases of this nature brought before this Court have been: 1) What is the proper *definition* of "obscenity"?; and 2) What *procedures* are constitutionally available to the States and the Federal Government in preventing the dissemination of obscene materials into society and in imposing punishment upon those guilty of so doing?

In our case now before this Honorable Court the major issue involves the *Procedure* used in a *criminal* prosecution of a person charged under a valid and Constitutional State Statute relative to obscene publications.

Appellees contend, and the three Judge Court below has held in its 2 to 1 decision rendered herein on July 14th, 1969 (see appendix pp 88 to 90), that although an arrest and prosecution relative to obscene publications is valid and within Constitutional safeguards in all other respects, the arrests are nevertheless "... invalid for want of a prior adversary judicial determination of obscenity ... (and) ... the prosecutions should be effectively terminated." (see appendix pp 96 to 97).

It is from this erroneous conclusion of law that this Appeal has been taken.

II.

IN A STATE CRIMINAL PROSECUTION UNDER A VALID AND CONSTITUTIONAL STATE STATUTE RELATIVE TO OBSCENE MATERIALS AND PUBLICATIONS, IT IS NOT NECESSARY THAT THERE BE A JUDICIAL ADVERSARY HEARING, PRIOR TO ARREST AND PROSECUTION OF THE DEFENDANT, TO DETERMINE WHETHER OR NOT THE MATERIALS AND PUBLICATIONS ARE OBSCENE UNDER THE TERMS OF THE STATE STATUTE

This Honorable Court has never held that there must be a Prior Adversary Judicial Hearing in State criminal prosecutions relative to obscene publications, as dictated by the majority of the three Judge Court below.

To the contrary, this Court has recently *affirmatively* indicated in the cases of *New York Feed Company v. Leary* and *Milky Way Productions v. Leary*, supra, decided February 27th, 1970, that such a novel procedure is *not* required in criminal prosecutions such as the one involved herein.

Even prior to the decisions in the *New York Feed Company* and *Milky Way Productions* cases, supra, this Court had consistently indicated that the conventional course of criminal procedure with its many constitutional safeguards, is an acceptable, and possibly

preferable, method available to the States in cases involving obscene publications.

In *Kingsley Books v. Brown*, supra, 354 U.S. 436, 437, the primary question was whether or not the State of New York could *supplement* "the existing conventional criminal provision dealing with pornography by authorizing ... a 'limited injunctive remedy' ...", it being conceded therein that the conventional criminal procedures had theretofore provided adequate safeguards.

> "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' (citing Near v. Minnesota, 283 U.S. 697, 716). And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. Alberts v. California, decided this day (1 L.Ed2d 1498). The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of Section 22-a." Kingsley Books v. Brown, 354 U.S. 436, 440, 441.

Thus, this Court in *Kingsley* affirmatively took judicial cognizance of the fact that the conventional course of criminal procedure was a constitutionally acceptable method of enforcing the requirements of decency against obscene publications, taking special

note of the case of *Alberts v. California*, supra, decided that same day, and indicating further that *extraordinary* protections must be imposed *only* when the States take steps to "*supplement* the existing *conventional* criminal provision(s) dealing with pornography."

In the consolidated cases of *Roth v. United States* and *Alberts v. California*, supra; in which this Court affirmed both convictions relative to obscene materials, the conventional course of criminal procedure had been followed, and there had been no Judicial Adversary Hearing to determine the obscene nature of the books prior to arrest and prosecution. In those cases, (354 U.S. 476, at p. 492), this Court concluded that:

> "In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited."

In a concurring opinion in the *Roth* and *Alberts* cases, supra, Mr. Chief Justice Warren reaffirmed his trust in the ordinary course of criminal procedure in dealing with cases involving obscene publications, just as he did in his dissenting opinion in the *Kingsley Books* case, supra (354 U.S. 436, at pp. 445 et seq.):

> "In is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture."

Roth v. United States, and Alberts v. California, 354 U.S. 476 at p. 495.

In his concurring opinion in the *Alberts* case, supra, 354 U.S. 476 at pp. 502 et. seq., Mr. Justice Harlan noted that the course of criminal prosecution of Alberts did not violate the Due Process Clause of the Constitution:

> "It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to 'deprave or corrupt' a reader."

In *Bantam Books v. Sullivan,* supra, 372 U.S. 58 at pp. 69, 70, this Court again recognized the safeguards inherent in the conventional course of criminal procedure in obscenity cases:

> "In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process."

In his concurring opinion in the *Bantam Books* case, supra, 372 U.S. 58 at p. 75, Mr. Justice Clark indicated his preference for "prosecution" as the better method of enforcing "the State's criminal regulations of obscenity."

In the case of *Mishkin v. New York*, supra, this Court affirmed Mishkin's conviction under a state obscenity statute, where there had been no "Prior Ju-

dicial Adversary Hearing." The majority opinion therein noted — as had Mr. Chief Justice Warren in his opinions in the *Roth, Alberts* and *Kingsley Books* cases, supra — that it is the *man*, not the publications, that is on trial in a criminal prosecution relative to obscene publications:

> "Appellant was not prosecuted for anything he *said or believed*, but for *what he did*, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books."
> *Mishkin v. New York*, 383 U.S. 502 at pp. 504, 505.

Other decisions confirmed by this Court in which the defendants had been convicted in criminal prosecutions using conventional criminal procedures, and in which there were no "Prior Judicial Adversary Hearings", are:

> Ginzburg v. United States, supra;
> Ginsberg v. New York, supra;
> Holden v. Arnebergh, supra.

The majority of the Three Judge Court below, in reaching its decision, relied most heavily upon this Court's holdings in the cases of *Marcus v. Search Warrant*, supra, and *A Quantity of Copies of Books v. Kansas*, supra.

However, a study of those two cases reveals that neither involved a *criminal* prosecution, but rather involved *civil* procedures designed to seize and destroy

allegedly obscene publications, and which civil procedures were *supplemental* to "the existing conventional criminal provision(s) dealing with pornography . . ." (Kingsley Books v. Brown, supra), and thus warranted the *extraordinary* protection of a "Prior Judicial Adversary Hearing", said "Hearing" being designed to prevent *unlawful search and seizure* of publications.

In a criminal prosecution for obscenity the search for and seizure of evidence incidental thereto is controlled by the stringent constitutional safeguards inherent in our entire system of criminal justice. *Monique Van Cleef v. New Jersey*, 395 U.S. 814, 89 S. Ct. 2051, 23 L. Ed. 2d 728 (1969); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L. Ed. 2d 685 (1969). Thus the extraordinary protection against unlawful search and seizure required by *Marcus* and *A Quantity of Copies of Books* has never been held necessary by this Court in cases involving criminal prosecutions relative to obscene publications.

Although this Honorable Court has never in its own words decreed that "In a State Criminal Prosecution Under a Valid and Constitutional State Statute Relative To Obscene Materials And Publications, It is Not Necessary That There Be A Judicial Adversary Hearing, Prior To Arrest and Prosecution Of The Defendant, To Determine Whether Or Not The Materials and Publications Are Obscene Under the Terms Of The State Statute", It has nevertheless affirmatively indicated that such is the case, by Summarily Affirming the Judgments of the Three Judge Court in the consolidated

cases of New York Feed Company v. Leary and Milky Way Productions v. Leary, supra.

The decision of the Three Judge Court therein reported at 305 F. Supp. 288, at pp. 296-297, had the following to say about the necessity of a "Prior Judicial Adversary Hearing" in criminal prosecutions involving obscene publications:

> "... what plaintiffs propose is indeed a relative "novelty," ...
>
> "a 'prior restraint' is also effected, plaintiffs say, when arrests are made — particularly multiple arrests for promoting the same publication — because this inhibits others from continuing to distribute the materials. And so, the argument concludes, there must be an adversary hearing and judicial determination preceding the inception of the criminal process ...
>
> "It is of interest in this connection, if by no means decisive, that plaintiffs' theory, if accepted, would have invalidated both federal and state convictions under obscenity statutes which have in the recent past been upheld by the Supreme Court, Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed. 2d 195 (1968); Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966). A point of greater importance, both as

a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the 'chill' or the 'prior restraint' against which they contend . . .

"The result, at least in terms of history, is to avoid any traditional form of 'prior restraint' because the *first overt impact* upon the allegedly protected area *comes at a time when all the protections and favorable presumptions of the criminal process are available to the defendant.* Cf. Near v. Minnesota, 283 U.S. 697, 713-714, 51 S.Ct. 625, 75 L. Ed. 1357 (1931).

"This is not to blink at the undeniable fact that arrests and prosecutions are likely to deter activities of the kind against which they are directed. The very existence of criminal sanctions for forms of expression, especially when the standards of liability are such vexed questions at the highest judicial levels, must have some appreciable tendency of the same type. See Smith v. California, 361 U.S. 147, 154-155, 80 S.Ct. 215, 4 L. Ed2d 205 (1959). The point remains that the inhibitions are not avoided by the new procedure plaintiffs want; they are, if anything pushed back to an earlier time of open contest when the burden of litigation and a species of readier "defeat" are likely to work their deterrent effects.

"It is inappropriate, we think, to 'weigh' (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the departure they urge are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. *The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity.* See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69-70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); Id. at 72-73, 83 S.Ct. at 640-641 (Douglas, J., concurring); Freedman v. Maryland, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441-443, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957); Near v. Minnesota, 283 U.S. 697, 713-715, 51 S.Ct. 625, 75 L. Ed. 1357 (1931). Bantam Books, supra, upon which plaintiffs rely, reminds us specifically that procedures short of prosecution, intended as potential substitutes, may be less acceptable than the standard proceeding that begins with complaint, information or indictment as the first, non-adversary determination.

"At any rate, we find no warrant in the First Amendment or the cases that give it full mean-

ing for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal p r o c e d u r e s affecting obscenity cases." (emphasis added)

Thus it is evident that the majority of the Three Judge Court below erred in dictating the necessity of a "Prior Judicial Adversary Hearing" in cases involving criminal prosecutions relative to obscene publications, and that this Honorable Court should now enter judgment rectifying said error.

III.

IT WAS NOT AN APPROPRIATE EXERCISE OF DISCRETION FOR THE THREE JUDGE COURT TO GRANT THE RELIEF IN PARAGRAPHS 1 AND 2 OF THE JUDGMENT OF AUGUST 14th, 1969, IN VIEW OF THE PENDENCY OF THE STATE PROSECUTION CHARGING VIOLATION OF REVISED STATUTES 14:106.

Counsel herein were specifically requested by this Court to brief and argue the above.

Section 2283 of title 28 of the United States Code provides that:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Con-

gress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

.t is submitted that it was partially in view of the above that the Three Judge Court below *alleged* that it was not issuing the Injunctive relief requested, when in fact the Decision therein had all the practical force, impact and effect of an Injunction, to wit:

(a) by dictating therein that the prosecuting attorneys could not "in good faith" continue pending prosecutions, or institute future prosecutions, (see Appendix, p. 97); and

(b) by rendering Judgment which Ordered and Adjudged

"(1) That all seized materials be returned, instanter, by the defendants to those plaintiffs from whom they were seized," and

"(2) That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs," (see Appendix p. 107).

What better way is there to "enjoin" a prosecution then to deprive the prosecutor of his evidence, and hang the threat over his head that he will be acting in "bad faith" — and thus submit himself to possible civil damages, while possibly giving cause for a "legal injunction" to issue — if he continues the pending prosecution.

It is significant to note at this stage the following:

1. There was only one arrest made in this case — that of Ledesma of January 27, 1969;
2. There was no illegal or "massive" search and seizure involved, and the Court below found that only "forty-five publications and a deck of playing cards" were seized incidental to the arrest by the police officers who left "more than three hundred similar publications" in the store (see Appendix, p. 86);
3. Ledesma suffered no loss of business or income, and suffered no irreparable injury; Ledesma is not a publisher, artist, photographer, or author, but, rather, borrowing the words of Mr. Chief Justice Warren, (concurring opinion, Roth v. United States, supra, 354 U.S. 476 at pp. 495, 496), he is a person ". . . engaged in the business of purveying textual or graphic matter openly advertised to appeal to the exotic interest of (his) customers. (He was) plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with pruient effect."
5. There was no allegation or finding of a lack of available State remedies herein;
6. The Court below found that the sections of the Louisiana Revised Statute involved herein (LSA — R.S. 14-106) "satisfy con-

stitutional requirements." (see Appendix, p 93); and

7. As noted in Judge Rubin's dissenting opinion (see Appendix, pp 108 to 118, at p. 116) . . . "the court (did) not find that the defendants (Perez, et al) have harassed the plaintiffs (Ledesma, et al), or that they have employed threats of prosecution to chill freedom of speech, or that there has been any other kind of misuse of the process of state criminal justice."

Considering the above, The Three Judge Court below should not have interfered with the state prosecutions, pending or future, in view of 28 U.S.C. 2283, supra, and the dictates of *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed 2d 22 (1965), *Cameron v. Johnson*, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed 2d 182, reh den 391 U.S. 971, 88 S. Ct. 1335, 20 L. Ed 2d 182 (1968), *New York Feed v. Leary*, supra, and *Milky Way Productions v. Leary*, supra.

> "... the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is particularly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to

justify a disruption of orderly state proceedings. (citing Douglas v. City of Jeannette, 319 U.S. 157, 87 L. Ed. 1324, 63 S. Ct. 877)." Dombrowski v. Pfister, supra, 380 U.S. 479, at pp. 484, 485.

In *Cameron v. Johnson*, supra, this Court held that there must be a showing of "special circumstances" beyond the injury to warrant Federal interference with a State's good-faith administration of its criminal laws, and that there must be sufficient proof of "bad-faith" prosecution, "irreparable injury" to the complainant, and inadequacy of available State remedies, none of which were found by the Three Judge Court herein.

In the original Complaint and Amended Complaint filed in the Federal District Court, Ledesma prayed:

"(4) that (the) Court issue a Preliminary and Permanent *Injunction* restraining and enjoining Defendants from ...:
(c) Retaining in their possession and not returning the books, magazines, and other publications previously seized by Defendants ..."
(emphasis added)
(see Appendix pp 16 to 17).

Since the Court specifically denied the *Injunctive* relief prayed for (see Appendix p. 107), Its Order for the return of the materials is inconsistent and illogical. Furthermore, Ledesma did not at any stage of these proceedings seek or pray for *suppression* of any materials, seized or purchased, as evidence. Nev-

ertheless, the Three Judge Court, for reasons unexplained, granted such relief (see Appendix p. 107). The result of the foregoing was to effectively "enjoin" the State's pending prosecution, the Court attempting to accomplish indirectly, that which it could not achieve directly because of the mandates of 28 U.S.C. 2283, and of the *Dombrowski, Cameron, New York Feed* and *Milky Way Productions* cases, supra.

Conclusive evidence of the permanent injunctive intent of the court below is its order of June 2, 1970, subsequent to the *Milky Way* and *New York Feed* cases, supra, denying Perez's motion to be relieved of the "prior judicial adversary hearing" requirement, and to set aside paragraphs 1 and 2 of the judgment of August 13, 1969. (see Appendix pp. 121 to 122).

The Three Judge Court was convened herein because of the prayer for Declaratory relief relative to a State Statute, and the prayer for Injunctive relief relative to a pending state prosecution. The Court, having refused to grant said Declaratory or Injunctive relief, should have held that the purposes for which it was convened had been accomplished, and that it would therefore be dissolved, as the Three Judge Court did in the *New York Feed* and *Milky Way Productions* cases, supra, 305 F.Supp 288, at p. 298. The Court nevertheless, erroneously chose to take additional unwarranted and unrequested action.

It is submitted that this Honorable Court should now enter judgment rectifying said error.

IV.

IT WAS NOT AN APPROPRIATE EXERCISE OF DISCRETION FOR THE THREE - JUDGE COURT IN PARAGRAPH 4 OF THE JUDGMENT OF AUGUST 14, 1969, TO DECLARE THE ST. BERNARD PARISH ORDINANCE NO. 21-69 UNCONSTITUTIONAL

Counsel herein were specifically requested by this Court to brief and argue the above.

The question of whether or not the Three Judge Court, having ruled the State Statute Constitutional, and having refused the Injunctive relief requested, should nevertheless have ruled on the Parish Ordinance, "... invites us to an area that 'abounds with slippery distinctions,' Wright, Federal Courts 164 (1963) ..." *Milky Way Productions v. Leary*, supra, 305 F. Supp 288, at p. 295. However, the rationale of *Milky Way Productions v. Leary*, supra, 305 F. Supp. 288 at pp 295 to 296, indicates that once three - judge jurisdiction is established on other grounds, the three - judge court may consider other issues which alone would not have warranted the convening of the three - judge court. The same rationale has been applied by this Court in the following cases:

Flast v. Cohen, 392 U.S. 83, 88 - 91, 88 S. Ct. 1942; 20 L. Ed 2d 947 (1968);

Zemel v. Rusk, 391 U.S. 1, 5 - 7, 85 S. Ct. 1271, 14 L. Ed 2d 179, reh den 382 U.S. 873, 86 S. Ct. 17, 15 L. Ed 2d 114 (1965);

Florida Lime v. Jacobson, 362 U.S. 73, 75 - 85, 80 S. Ct. 568, 4 L. Ed 2d 568 (1960);

United States v. Georgia Public Service Commission, 371 U.S. 285, 286 - 288, 83 S. Ct. 397, 9 L. Ed 2d 317 (1963).

"So we have a clear case for convening a three - judge court. Once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three - judge court. See Sterling v. Constantin, 287 U. S. 378, 393, 394, 77 L. Ed 375, 382, 383, 53 S. Ct. 190; Railroad Com. of California v. Pacific Gas & E. Co., 302 U.S. 388, 391, 82 L. Ed. 319, 321, 58 S. Ct. 334." *United States v. Georgia Public Service Commission*, supra, 371 U.S. 285, 287, 288.

Despite the above, the Three Judge Court below should have elected to take no action in reference to the St. Bernard Parish Ordinance.

Prior to the trial which led to the Judgment of August 14, 1969, a *nolle prosequi* had been entered in each of the charges against Ledesma relative to the Parish Ordinance, terminating the prosecutions thereunder.

Therefore, at the time of trial there was no "*controversy* of sufficient *immediacy* and *reality* to warrant a declaratory judgment." (emphasis added). *Golden v. Zwickler*, 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed 2d 113 (1969). See also: *Douglas v. Jeannette*, 319 U.S. 157, 87 L. Ed 1324 (1943); *Zwicker v. Boll*, 391 U.S. 353, 88 S. Ct. 1666, 20 L. Ed 2d 642 (1968).

Since no evidence was produced at trial to show that Ledesma, Speiss or Pittman had been threatened with, or personally feared, future prosecution under the Parish Ordinance, there was "no ground for supposing that the intervention of a federal court, in order to secure petitioner's constitutional rights, (was) either *necessary* or *appropriate*." (emphasis added). *Douglas v. Jeannette*, supra, 319 U.S. 157, at p. 165.

Therefore, the Three Judge Court erred in not abstaining from consideration of the constitutionality of the St. Bernard Parish Ordinance, and in declaring said Ordinance unconstitutional.

CONCLUSION

It is submitted that in a State Criminal Prosecution under a valid and Constitutional State Statute relative to obscene materials and publications, it is not necessary that there be a Judicial Adversary Hearing, prior to arrest and prosecution of the defendant, to determine whether or not the materials and publications are obscene under the terms of the State Statute.

For the foregoing reasons, there should be Judgment herein in favor of Appellants:

1. Setting aside that portion of the Decision of the Three Judge Court which dictated that no arrest or prosecution can be made under Louisiana Revised Statute 14:106 unless there has been a judicial adversary

hearing, prior to arrest, to determine whether or not the materials involved are obscene under the terms of said Statute;

2. Setting aside that portion of the Decision of the Three Judge Court which dictated that the pending prosecutions against Appellee Ledesma should be "effectively terminated";

3. Reversing and setting aside Paragraphs 1 and 2 of the Judgment, which ordered that all seized materials be returned, instanter, and that the materials be suppressed as evidence in any pending or future prosecutions; and

4. Reversing and setting aside Paragraph 4 of the Judgment, which declared St. Bernard Parish Ordinance No. 21-60 unconstitutional.

Respectfully Submitted,

Attorney for Appellants
CHARLES H. LIVAUDAIS

Of Counsel:
Robert J. Klees
Attorney at Law

PROOF OF SERVICE

I, Charles H. Livaudais, attorney for Appellants herein, hereby certify that I served three copies of the foregoing Original Brief On Behalf Of Appellants, and three copies of the Single Appendix thereto, together with a copy of the statement of costs therefor, upon Appellees herein, by mailing same, postage prepaid, to their counsel of record, Jack Peebles, 323 West William David Parkway, Metairie, Louisiana 70005, prior to the filing thereof in the United States Supreme Court.

CHARLES H. LIVAUDAIS
Attorney for Appellants